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### (Re)Framing Race in Civil Rights Lawyering

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**(Re)Framing Race in Civil Rights Lawyering***Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow*

By Henry Louis Gates, Jr.

Penguin Press, 2019

Angela Onwuachi-Willig\* &amp; Anthony V. Alfieri\*\*

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## (RE)FRAMING RACE IN CIVIL RIGHTS LAWYERING

## INTRODUCTION

The community at St. Paul's J.J. Hill Montessori School in St. Paul, Minnesota—students, parents, and employees alike—loved Philando Castile, a black cafeteria supervisor who made their days brighter with his warm and welcoming smile, who consistently encouraged the students he nourished every day with lunch to eat their “veggies,” and who affectionately became known to all as “Mr. Phil.”<sup>1</sup> Following Castile's premature and tragic death at the hands of Officer Jeronimo Yanez, J.J. Hill community members remembered the thirty-two year old son of Valerie Castile, boyfriend of Diamond Reynolds, and father figure to Dae'Anna, Reynolds's then-four year old daughter, with an abundance of memories and praises. They described Castile as nice, caring, smart, patient, quiet, generous, gentle, funny, soft-spoken, kind, respectful, cheerful, and even overqualified for his position as a cafeteria supervisor.<sup>2</sup> Indeed, a headline from the *Washington Post* communicated that Castile “was a role model to thousands of kids.”<sup>3</sup> Castile's former colleague at J.J. Hill, Joan Edman, a then-sixty-two year old retired paraprofessional, proclaimed that “Castile was a dutiful worker who adhered to rules strictly.”<sup>4</sup> Edman explained that she had “never seen anybody take that kind of role so seriously. . . . He followed directions carefully.”<sup>5</sup> From all accounts, everyone who had the great fortune of knowing Castile regarded him as an “exceedingly gentle and unfailingly kind man who did everything right.”<sup>6</sup>

Despite the realities of who Castile was as a person, on July 6, 2016, when Officer Yanez pulled Castile over in a traffic stop (for what would be Castile's 52nd police stop in just 13 years),<sup>7</sup>

<sup>1</sup> Maja Beckstrom, *How Parents Are Talking to Their Kids About Philando Castile's Death*, TWINCITIESPIONEERPRESS.COM (July 14, 2016, 5:16 p.m. CST), <https://www.twincities.com/2016/07/14/philando-castile-shooting-parents-talking-kids/>.

<sup>2</sup> See Melissa Chan, *Philando Castile Was a Role Model to Thousands of Kids, Colleagues Say*, TIME.COM (July 7, 2016, 2:47 P.M. EDT), <https://time.com/4397086/minnesota-shooting-philando-castile-role-model-school/>; Bill Chappell, *Philando Castile Is Remembered By St. Paul Public Schools: 'Kids Loved Him,'* NPR.COM (July 7, 2016, 1:31 P.M. ET), <https://www.npr.org/sections/thetwo-way/2016/07/07/485114263/philando-castile-is-remembered-by-st-paul-public-schools-kids-loved-him>. The St. Paul Public School District, where Castile worked for 14 years (since he was 19 years old), provided the following statement in relevant part:

Colleagues describe him as a team player who maintained great relationships with staff and students alike. He had a cheerful disposition and his colleagues enjoyed working with him. He was quick to greet former coworkers with a smile and hug.

One coworker said, “Kids loved him. He was smart, over-qualified. He was quiet, respectful, and kind. I knew him as warm and funny; he called me his “wing man.” He wore a shirt and tie to his supervisor interview and said his goal was to one day “sit on the other side of this table.”

Those who worked with him daily said he will be greatly missed.

Chappell, *supra*.

<sup>3</sup> Chan, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Ariel Scott, *Philando Castile Left Behind Hundreds of Kids Who Loved Him at the School Where He Worked*, N.Y. DAILY NEWS (June 22, 2017, 12:49 P.M. EST), <https://www.nydailynews.com/news/national/philando-castile-left-behind-395-kids-loved-article-1.3269078>.

<sup>7</sup> See *Philando Castile Had Been Stopped 52 Times By Police*, CBSMINNESOTA (July 9, 2016, 9:00 A.M. CST), <https://minnesota.cbslocal.com/2016/07/09/philando-stops/> (noting that Castile “was assessed at least \$6,588 in fines and fees, although more than half of the total 86 violations were dismissed,” which put in a vicious cycle of debt that many low-income residents find themselves in with such fines); see also Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016),

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Yanez simply could not see Castile as anything more than a racial stereotype. For Yanez, Castile was, as Professor Henry Louis Gates, Jr. would say, “an already read text.”<sup>8</sup> Although the officer had purportedly stopped Castile only because of a broken tail light,<sup>9</sup> which by itself should not make any driver suspicious, the officers began his interactions with Castile with deep suspicion of the black man he saw before him. Whether Yanez’s racial biases were conscious or nonconscious, he began to feel apprehensive of Castile and read him as dangerous almost from the beginning. When he first described his initial encounter with Castile, with girlfriend Reynolds and her daughter in the backseat, Yanez explained:

“I told them the reason for the traffic stop and then I wasn’t going to say anything about the marijuana yet because I didn’t want to scare him or have him react in a defensive manner. Um, he didn’t make direct eye contact with me and it was very hard to hear him, Uh he was almost mumbling when he was talking to me. And he was directing his voice away from me as he was speaking and as I was asking questions. Uh he kept his, hands in view and then I uh I believe I asked for, his license and insurance. And then I believe they told me, they asked for the reason for my traffic stop. And I told ’em the reason was the only, I think I told ’em the only rea, the reason I pulled you over is because the only active brake light working was the rear passenger side brake light.”<sup>10</sup>

A close reading of Yanez’s words illustrates how racial stereotyping must have shaped his perceptions of Castile, making him unable to see Castile, a dark-skinned black man with locs<sup>11</sup>

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<https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html> (“In a 13-year span, Philando Castile was pulled over by the police in the Minneapolis-St. Paul region at least 49 times, an average of about once every three months, often for minor infractions.”); Eyder Peralta & Cheryl Corley, *The Driving Life and Death of Philando Castile*, NPR: THE TWO WAY (July 15, 2016, 4:51 A.M. EST), <https://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile> (“Of all of the [46] stops, only six of them were things a police officer would notice from outside a car — things like speeding or having a broken muffler.” The records show that Castile spent most of his driving life fighting tickets. Three months after that first stop [when he received his learner’s permit at 19], for example, his license was suspended and he went into his first spiral: Police stopped him on Jan. 8, 2003. They stopped him on Feb. 3 and on Feb. 12 and Feb. 26 and on March 4.)

<sup>8</sup> HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 132 (2019) (“STONY THE ROAD”) (quoting Barbara Johnson, *The Critical Difference*, 8 *DIACRITICS* 2, 2 (1978)).

<sup>9</sup> Just 16 hours after the shooting, Officer Yanez offered the broken taillight as his reason for stopping Castile. See Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017, 5:22 P.M.), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/>. Days later, the officer changed his story, asserting that he stopped Castile because he fit the description of a suspect who had committed a robbery days earlier because he had a “wide-wet nose.” Angela Bronner Helm, *Report: Philando Castile Was Pulled Over Because He Matched Description of Suspect With ‘Wide-Set Nose,’* THE ROOT.COM (July 10, 2016, 9:46 A.M. EDT), <https://www.theroot.com/report-philando-castile-was-pulled-over-because-he-mat-1790855964> (quoting Castile’s uncle as saying “It’s kind of hard to see flared nostrils from a car”).

<sup>10</sup> Berman, *supra* note 9. Yanez “told investigators later that the marijuana smell remained in his mind, saying that because of the odor, he didn’t know whether Castile had the gun ‘for protection’ from a drug dealer or people trying to rob him.”

<sup>11</sup> Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEORGETOWN L.J. 1079 (2010) (asserting that “locs” consist of sections of hair that are “permanently locked together and cannot be unlocked without cutting”); see also Shauntae Brown White, *Releasing the Pursuit of Bouncin’ and*

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and, as Yanez would later describe, “a wide-set nose,”<sup>12</sup> as anything other than dangerous and criminal. For instance, the quiet and soft-spoken voice that J.J. Hill community members found to be one of Castile’s endearing qualities was heard by Yanez as the incoherent mumblings of a man with something to hide. Additionally, rather than viewing the actions that Castile—a black man who had been subject to police traffic stops on 52 different occasions—was clearly engaging in to appear non-threatening and safe and thus protected from any police violence, Yanez instead viewed such conduct with grave distrust and fear. It did not matter that Castile’s action’s read like a veritable script of “The Talk,” an intergenerational script of advice and warnings by black parents (and parents of black children) designed to prepare them for surviving the police stops they will encounter in our racist society.<sup>13</sup> As Yanez explained in the quote above, Castile kept his “hands

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*Behavin’ Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 INT’L J. MEDIA & CULTURAL POL. 295, 296 n.3 (2005); see also Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 873 n.3 (2006) (defining locs). According to Shauntae Brown White, the term “loc” or “lock” is preferred to the term “dreadlock,” as “the term dreadful was used by English slave traders to refer to Africans’ hair, which had probably loc’d naturally on its own during the Middle Passage.” White, *supra*, at 296 n.3.

<sup>12</sup> Helm, *supra* note 9. At trial, Retired Deputy Police Chief Jeffrey Noble testified on behalf of the prosecution. Testifying about the claim that Yanez pulled Castile over because the “wide-set” nature of his nose marked him as a suspect, Noble asserted that “[n]o other ‘reasonable’ officer would have considered Castile a suspect.” He explained, “I mean, hundreds of black men had to have driven by. . . . That’s absurd.” Chao Xiong, *Expert: Jeronimo Yanez’s Actions in Killing Philando Castile Were ‘Objectively Unreasonable,’* STAR TRIB. (June 8, 2017), <https://www.startribune.com/chao-xiong/10646266>.

<sup>13</sup> Castile’s mother, Valerie, had the talk many times with her son. See Michelle Garcia, *Philando Castile Did What His Mother Told Him To Do Around Police. A Cop Shot Him Anyway*, VOX.COM (July 7, 2016, 1:30pm EDT), <https://www.vox.com/2016/7/7/12119344/philando-castile-mother-valerie-castile> (noting that Castile “was given the same lecture so many black people in America hear at one point in their lives”); see also John Blake, George Floyd. Ahmaud Arbery. Breonna Taylor. What Can Black Parents Possibly Tell Their Kids Now About Staying Safe?, CNN.COM (May 29, 2020, 12:39 P.M. EDT), <https://www.cnn.com/2020/05/29/us/black-parents-children-safety-talk-blake/index.html>. After George Zimmerman killed Trayvon Martin in Sanford, Florida, Eric Holder, the nation’s first black Attorney General introduced much of white America to the existence of “The Talk” with a moving speech about the sad tradition he was passing down to his son after Martin’s death. Attorney General Holder declared in relevant part:

Years ago, some of these same issues drove my father to sit down with me to have a conversation -- which is no doubt familiar to many of you -- about how as a young black man I should interact with the police, what to say, and how to conduct myself if I was ever stopped or confronted in a way I thought was unwarranted. I’m sure my father felt certain -- at the time -- that my parents’ generation would be the last that had to worry about such things for their children.

Since those days, our country has indeed changed for the better. The fact that I stand before you as the 82nd Attorney General of the United States, serving in the Administration of our first African American president, proves that. Yet, for all the progress we’ve seen, recent events demonstrate that we still have much more work to do -- and much further to go. The news of Trayvon Martin’s death last year, and the discussions that have taken place since then, reminded me of my father’s words so many years ago. And they brought me back to a number of experiences I had as a young man -- when I was pulled over twice and my car searched on the New Jersey Turnpike when I’m sure I wasn’t speeding, or when I was stopped by a police officer while simply running to a catch a movie, at night in Georgetown, in Washington, D.C. I was at the time of that last incident a federal prosecutor.

Trayvon’s death last spring caused me to sit down to have a conversation with my own 15 year old son, like my dad did with me. This was a father-son tradition I hoped would not need to be handed down. But as a father who loves his son and who is more knowing in the ways of the world, I had to do this to protect my boy. I am his father and it is my responsibility, not to burden him with

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in view,”<sup>14</sup> and Castile did not stare at him or make “direct eye contact” with him.<sup>15</sup> Castile even politely warned the officer about the legally registered gun that he had in his possession, not as a means of alarming the officer (which it did), but instead as a means of relieving Yanez and assuring him that he was not in danger. After all, what person intending to do harm to an officer by shooting him actually warns the officer, who is armed himself, that he has a gun on him, thereby eliminating the element of surprise and any advantage he could have had in a shootout with the officer?

Still, racism and bias won out over common sense and logic during the 52nd police traffic stop for Castile, pushing Yanez to shoot Castile as Castile sought to comply with Yanez’s instruction to provide him with his license and registration. Yanez, however, did not see an effort to comply. Instead, he saw in Castile an image he had deeply internalized of the dangerous, criminal, out-of-control, rule-defying-and-breaking black man.<sup>16</sup> Like so many implicit bias studies have shown, Yanez imagined a gun in the hands of a black man in circumstances where he would not have imagined one in the hands of a white man.<sup>17</sup> As Yanez asserted about Castile,

[He] appeared defensive to me. . . . As I was giving him direction about what to give me . . . I felt that he had no regard to what I was saying. He didn’t care what I was saying. He didn’t want to follow what I was saying so he just wanted to do

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the baggage of eras long gone, but to make him aware of the world he must still confront. This is a sad reality in a nation that is changing for the better in so many ways.

Garance Franke-Ruta, *Listening In on ‘The Talk’: What Eric Told His Son About Trayvon Martin*, THE ATLANTIC (July 16, 2013), <https://www.theatlantic.com/politics/archive/2013/07/listening-in-on-the-talk-what-eric-holder-told-his-son-about-trayvon/277861/>.

<sup>14</sup> Berman, *supra* note 9.

<sup>15</sup> Berman, *supra* note 9; see also Stacia L. Brown, *Looking While Black: When Eye Contact with the Police Is Considered a Crime*, THE NEW REPUBLIC (April 30, 2015), <https://newrepublic.com/article/121682/freddie-grays-eye-contact-police-led-chase-death> (reminding readers that the events that led to Freddie Gray’s death began to with mere “eye contact with the police” and noting that “no black man is eager to initiate a staring contest with the cops”). At Freddie Gray’s funeral, the Reverend who offered the eulogy communicated these words to Gray’s mother about his eye contact with the police:

On April 12 at 8:39 in the morning, four officers on bicycles saw your son. And your son, in a subtlety of revolutionary stance, did something black men were trained to know not to do. He looked police in the eye. And when he looked the police in the eye, they knew that there was a threat, because they’re used to black men with their head bowed down low, with their spirit broken. He was a threat simply because he was man enough to look somebody in authority in the eye. I want to tell this grieving mother... you are not burying a boy, you are burying a grown man. He knew that one of the principles of being a man is looking somebody in the eye.

*Id.*

<sup>16</sup> See R. Richard Banks, Jennifer Eberhardt, and Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1172-73 (2006) (discussing how blackness has been linked with criminality); Jennifer L. Eberhardt *et al.*, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881-83 (2004) (finding, in a psychological study, that police officers not only viewed a greater number of black faces than white faces as criminal, but also viewed black faces that were deemed to be the most “stereotypically black,” for example, those faces with wide noses, thick lips, or dark skin, “as the most criminal of all”).

<sup>17</sup> See Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2060 (2011) (noting that “police officers in simulations were more likely to shoot unarmed black suspects than unarmed white suspects, and to misidentify black suspects more readily than white suspects; Banks, *supra* note 16, at 1174 (indicating that there are studies that show that “images of unarmed Black men were more likely to be ‘shot’ than were images of unarmed White men”).

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what he wanted to do. I, believe I continued to tell him don't do it or don't reach for it and he still continued to move. And, it appeared to me that he had no regard to what I was saying. He didn't care what I was saying. He still reached down. . . . And, at that point I, was scared and I was, in fear for my life and my partner's life. . . . I was telling something as his hand went down I think. And, he put his hand around something. And his hand made like a C shape type um type shape and it appeared to me that he was wrapping something around his fingers and almost like if I were to put my uh hand around my gun like putting my hand up to the butt of the gun.<sup>18</sup>

In the end, Yanez saw what society had taught him to see in black people, and in this instance, black men: danger. Yanez saw defiance and an insistence and intent to break the rules and disregard them from a man known for and respected for his careful attention to and adherence to instruction and directions. And, in turn, Yanez felt what society had shown him to feel in response: trepidation and fear. At no time during the encounter did Yanez come to see the real Castile, nor did he try to do so. Had Yanez done so, had Yanez seen Castile as he truly was and as so many around him knew him to be, Yanez might have noticed what Castile's girlfriend Diamond Reynolds proclaimed to be true on that fated day of July 6, 2016: that "[n]othing within [Castile's] body language said shoot me."<sup>19</sup>

Confused by the unnecessary killing of their beloved Mr. Phil, the two children of Kirkja Janson, a white mother who made a point of openly speaking with her white children about the racial stereotypes that she believes motivated Yanez's decision to shoot Castile, posed an important question to their mom. They innocently asked, "How could anyone think Mr. Phil was dangerous?"<sup>20</sup>

In his important new book, *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow*, Professor Henry Louis Gates, Jr. answers this innocent question by detailing, presenting, and analyzing the images, stereotypes, and narratives that Whites<sup>21</sup> constructed of Blacks to deepen and ensure the life and legacy of white supremacy and privilege during the eras of Reconstruction, Redemption and Jim Crow segregation, the Harlem Renaissance, and even today. In many ways, Gates's response in *Stony the Road* mirrors the actual response given by mother Kirkja Janson to her children. Janson replied to her kids: "[T]here are stereotypes out there that black people aren't going to follow the rules and that black men, especially, are more dangerous than other men."<sup>22</sup> She continued, "It's not based on the individual's behavior. It's based on stereotypes that go back a long time."<sup>23</sup> In *Stony the Road*, Gates reveals how this "practice of xenophobic masking" continues

<sup>18</sup> Berman, *supra* note 9.

<sup>19</sup> Chan, *supra* note 2.

<sup>20</sup> Beckstrom, *supra* note 1; see also Emma Brown, 'He Knew The Kids and They Loved Him': Minn. Shooting Victim Was An Adored School Cafeteria Manager, WASH. POST (July 7, 2016, 6:02 P.M. EST), <https://www.washingtonpost.com/news/education/wp/2016/07/07/he-knew-the-kids-and-they-loved-him-minnesota-shooting-victim-was-an-adored-school-cafeteria-manager/> (noting that "[t]hose who knew Castile said it was difficult to imagine how he could appear as threatening or why an officer would have felt he had to react with deadly force").

<sup>21</sup> Throughout this Essay, we capitalize the terms "Black" and "White" only when used as nouns to describe specific racial groups. Here as elsewhere, we use the term "Blacks," rather than the term "African Americans," because it is more inclusive. See Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1488 n.5 (2013).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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to thrive in society today. In so doing, he introduces readers to the “Old Negro”—to the “stereotyped and debased” images of black people that were first defined during slavery and that have been redefined and reimagined throughout our nation’s history in order to justify the cruel, unfair, dehumanizing, and unjust treatment that Blacks have long faced in the United States.<sup>24</sup> As Gates declares early on, the “Old Negro” was “rural, Southern, impoverished, illiterate, premodern, “uncivilized,” and even “unwashed.””<sup>25</sup> At the same time, Gates, the Alphonse Fletcher University Professor and Director of the Hutchins Center for African and African American Research at Harvard University, relays the history and emergence of the images and counternarratives that were created, designed, and communicated by Blacks as forms of resistance and as a means of galvanizing struggles against antiblack racism in the United States in the past and today.<sup>26</sup> These new images and counterstories center on what Gates refers to as the “New Negro.” In depicting the “New Negro,” Gates also critiques the manner in which presentations of the “New Negro” were entrenched in the “politics of respectability” and reified troubling assumptions about class differences among Blacks, including the need for the most “Talented Tenth” of the race to guide the masses.<sup>27</sup>

Although widely acclaimed in the media,<sup>28</sup> *Stony the Road* has received scant attention from the legal academy, bar, and bench. Indeed, neither academics, nor practitioners, nor judges have addressed its significance for the study of racism and its evolution in our nation’s legal system or for the regulation of race in the legal profession, especially in the everyday labor of civil rights and poverty lawyers, prosecutors, and public defenders. The purpose of this Review Essay is to explore the relevance of the racial tropes, narratives, and images distilled by Gates in *Stony the Road* to the practice of law inside this nation’s civil and criminal justice systems and, more generally, to critical theories of race, the persistence of racism, and race-conscious legal representation. To that end, this Essay fuses a growing body of work on race and the lawyering process in the fields of civil rights,<sup>29</sup> criminal justice,<sup>30</sup> and poverty law,<sup>31</sup> at times culling from the literature of legal ethics<sup>32</sup> and legal

<sup>24</sup> GATES, *STONY THE ROAD*, *supra* note 8, at xviii, 1, 4, 14 (asserting that “[c]harting how white supremacy evolved during Reconstruction and Redemption is crucial to understanding in what forms it continues to manifest today”).

<sup>25</sup> *Id.* at xviii.

<sup>26</sup> GATES, *STONY THE ROAD*, *supra* note 8, at xiv–xv.

<sup>27</sup> *Id.* at 189–96.

<sup>28</sup> See Adam Gopnik, *How the South Won the Civil War*, NEW YORKER (Apr. 8, 2019), <https://www.newyorker.com/magazine/2019/04/08/how-the-south-won-the-civil-war>; James Oakes, *An Unfinished Revolution*, N.Y. REV. BOOKS (Dec. 5, 2019), <https://www.nybooks.com/articles/2019/12/05/reconstruction-unfinished-revolution/>.

<sup>29</sup> See, e.g., Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law’s Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629 (2019); Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459 (2005); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343 (2019).

<sup>30</sup> See, e.g., Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003). Cf. Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651 (2009).

<sup>31</sup> See, e.g., Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374 (2017); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107 (1991); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005).

<sup>32</sup> See, e.g., Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).



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education.<sup>33</sup> The goal of this synthesis is to interrogate, contest, and reimagine the intersectional place of race in the legal representation of individual, group, and community clients of color.<sup>34</sup>

Read from an interdisciplinary stance of theory and practice, Gates's *Stony the Road* offers several instructive lessons on race and legal representation germane to lawyers, judges, and academics teaching in law school classrooms and clinics. The first lesson is that the white supremacist tropes, narratives, and images of the postbellum periods of Redemption and Jim Crow segregation continue to *frame* or mold our legal consciousness (perception, cognition, interpretation) of race, shaping the roles, mediating the relationships, and organizing the methods of the lawyering process in civil rights, poverty law, and criminal cases. The second lesson is that the trial of civil rights, poverty law, and criminal cases provides a forum for lawyers, judges, jurors, and even witnesses to *race-code* or stereotype the identity of accused and convicted offenders, impoverished clients, and victims of discrimination in ways that diminish the agency, dignity, and power of individuals, groups, and communities of color. The third lesson is that the trial of civil rights, poverty law, and criminal cases also affords lawyers and clients meaningful, collaborative opportunities to *reframe* or unmask race-coded identity in order to recover the presence of black agency, enhance the exercise of black power, and contextualize the public and private impact of systemic racism on individuals, groups, and communities as a whole.

The Review proceeds in four parts. Part I parses Gates's analysis of the rise of white supremacist ideology and the accompanying concept of the "Old Negro" during the Redemption era and the countervailing emergence of the concept of a "New Negro" culminating in the Harlem Renaissance. This dual analysis recounts the institutionalization of white supremacy in the United States, its culture, and society, and the articulation of an opposing narrative of black agency, rights, and resistance, a narrative of civic and cultural self-defense resonant in current strands of legal and political discourse. By sketching the cultural and social forms of Jim Crow imagery and narrative, and searching the "Old Negro" and the "New Negro" iterations and dichotomies within the discourse of black people, Gates erects a critical backdrop for lawyers to understand the stereotypical beliefs, tropes, and images pervading white supremacist ideology. In so doing, Gates illuminates how Jim Crow narratives and images infected (and continue to infect) law and lawyer consciousness in civil and criminal justice representation and how (and why) those narratives and images are still with us in proceedings ranging from high-profile race discrimination cases to lesser-known criminal trials.

Part II examines the lawyering process as a rhetorical site for constructing racialized narratives and racially subordinating visions of client, group, and community identity through acts of representing, prosecuting, and defending people of color in civil rights, poverty law, and criminal cases. Traced to the antebellum roots laid bare by Gates, racialized narratives describe the behavior, character, and credibility of accused offenders, indigent claimants, and victims of discrimination in generalized, race-based terms associated with debased group cultural and social

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<sup>33</sup> See, e.g., Anthony V. Alfieri, (*Un*)*Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008); Angela Onwuachi-Willig, *The Fire This Time: Reflections on Recent Killings and Protests*, THE RECORD (June 1, 2020), <https://www.bu.edu/law/record/articles/2020/dean-angela-onwuachi-willig-commentary-the-fire-this-time/>; Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105 (2018).

<sup>34</sup> On the intersectional place of race, gender, and class in legal representation, see Angela Onwuachi-Willig, *From Emmett Till to Trayvon Martin: The Persistence of White Womanhood and the Preservation of White Manhood*, 15 DU BOIS REV. 257 (2018); Angela Onwuachi-Willig, *From Protecting Whiteness as Property to Protecting White Property: Emmett Till, Trayvon Martin, and Policing the Boundaries of Whiteness*, 102 IOWA L. REV. 1113 (2017).

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histories, rather than in particular, evidence-based terms of individual actions and contexts. Likewise tracked through the visual rhetoric of postbellum Jim Crow laws and practices recorded by Gates, racially subordinating visions cast individuals, groups, and entire communities in terms of demeaning racial caricatures and stereotypes.

Part III evaluates the permissibility of racialized narratives and racially subordinating visions under what courts like to refer to as colorblind or race-neutral lawyering process traditions and legal ethics conventions, assessing their logic under naturalistic and necessitarian rationales borrowed from the science, literature, and symbolism of Jim Crow segregation excavated by Gates. A wide span of lawyers — criminal prosecutors and public defenders as well as civil rights and poverty lawyers — routinely craft such narratives and images in their work. Lawyer-configured, naturalistic rationales appeal to an immutable social order, a chain of being, of race-based hierarchy to justify the use of racialized narratives and racially subordinating visions. Lawyer-improvised, necessitarian rationales invoke the adversary system-derived duty of aggressive advocacy and the paternalism-deduced obligation of means-oriented intervention to justify the use of race-infected narratives and visions.

Part IV puts forward an alternative set of race-conscious advocacy practices and ethics precepts infused by the antisubordination norms of racial dignity and equality garnered from the early black resistance movements documented by Gates for use in contemporary civil rights, poverty law, and criminal cases attacking legal, political, and economic systems of structural inequality. The search of such alternative race-conscious practices and precepts reveals the continuities linking past (New Negro Renaissance) and present (Black Lives Matter) resistance movements and the tensions dividing those movements, especially intraracial class conflict and the politics of respectability.

## I. Race and Racism in Law, Culture, and Society

Gates teaches the sociolegal lessons of *Stony the Road* — the framing effect of white supremacist tropes and images, the stereotypical coding and subordination of racial identity, and the reframing of black agency and power — by inspecting two stock figures from the cultural and social history of Reconstruction, Redemption, and Jim Crow segregation. The first, personified by the “Old Negro” of the rural South, envisions freedmen and freedwomen as “impoverished, illiterate, premodern, ‘uncivilized,’ even ‘unwashed.’”<sup>35</sup> The second, symbolized by the “New Negro” of the Harlem Renaissance, imagines an “increasingly urban and urbane, modern, educated, cultured, international, professional, well attired and well appointed, ‘clean’” African-American vanguard.<sup>36</sup> To Gates, the competing visions of race embedded in the Old Negro/New Negro dichotomy proved over time to be dynamic and malleable, susceptible not only to invention and improvisation, but also to reappropriation and reconfiguration. The centuries-long struggle to appropriate and refashion the meaning of race embodied in the figures of the Old Negro and the New Negro signals a continuous effort to enforce and, conversely, to combat successive iterations of the ideology of white supremacy. That ongoing struggle implicates the daily practices of civil rights, criminal justice, and poverty law advocacy.

<sup>35</sup> GATES, *STONY THE ROAD*, *supra* note 8, at xviii.

<sup>36</sup> *Id.*

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*A. Framing Blackness: White Supremacist Tropes and Images*

Gates locates the status-framing tropes and images of white supremacy in the pivotal eras of Reconstruction and Redemption.<sup>37</sup> To Gates, Reconstruction, the period from 1865 to 1877, carried a *double meaning* gained from “readmitting the conquered Confederate states to the Union” and, simultaneously, “granting freedom, citizenship, and a bundle of political, civil, and economic rights to African Americans—both those free before the war and those freed by it.”<sup>38</sup> Saturated by deep-seated, antiblack racism, that double meaning quickly skewed toward redemptive white supremacy, acquiring its own discourse, imagery, mythology, and scientific logic, all tailored to debase the status of the Negro in popular literature and art. Under the Redemption era ideology of white supremacy informing the content of Southern Black Codes and Jim Crow laws,<sup>39</sup> Gates shows, the subordinate status of black people became entrenched in the rigid socioeconomic hierarchies of labor peonage,<sup>40</sup> convict leasing,<sup>41</sup> and sharecropping.<sup>42</sup>

Gates views the Redemption era and the ascendance of the New South, roughly from 1877 to 1915, as a period marked by the imposition of a white supremacist, hierarchical system of “neo-enslavement” on earlier freed African-American agricultural workers.<sup>43</sup> For Gates, the redeemed South enacted a regime of neo-enslavement through a “terrorist” campaign of intimidation and violence as well as a “propaganda” campaign seeking permanently to devalue the humanity of freedmen and freedwomen.<sup>44</sup> That “propaganda war,” he laments, worked to define the nature of the Negro as a “subhuman”<sup>45</sup> species outside of the human community altogether.<sup>46</sup>

Gates maps the Jim Crow hierarchies regulating the economic, political, and social spheres of race relations during the Redemption era, demarcating the cultural and moral legitimacy gathered from the white supremacist discourses of racial science, journalism, political rhetoric, and popular fiction and folklore.<sup>47</sup> To Gates, the ideology of white supremacy unfolded in an intertwined set of post-Civil War discourses that “suspended” freedpeople “in a liminal state somewhere between enslavement and quasi-citizenship, as close as a person can be to being a slave without being legally defined as such.”<sup>48</sup> Those “ideologically tainted” images and discourses symbolically denigrated freedmen and freedwomen, depicting them as “inherently inferior” and, thereby, rationalizing their disenfranchisement and second-class citizenship.<sup>49</sup>

Among the myriad white supremacist signifying discourses collected by Gates, racial

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<sup>37</sup> *Id.* at 5-7.

<sup>38</sup> *Id.* at 6-7.

<sup>39</sup> On the Black Codes and Jim Crow laws, see DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW* (1997).

<sup>40</sup> On labor peonage laws and practices, see DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

<sup>41</sup> On convict leasing, see ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996).

<sup>42</sup> On sharecropping and debt peonage, see PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969* (1990). See also GATES, *supra* note 8, at 187.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 56 (footnote omitted).

<sup>46</sup> *Id.* at 56-66.

<sup>47</sup> *Id.* at 56 (footnote omitted).

<sup>48</sup> *Id.* at 56.

<sup>49</sup> *Id.* at 56 (footnote omitted).

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science stands out for its virulent antiblack racism. Gates denotes nineteenth century racial science by its use of professedly “objective ‘measurements’” to summarily “‘prove’ fundamental, ‘natural,’ biologically based essential differences between black people and white people.”<sup>50</sup> Later amplified by the twentieth century eugenics movement,<sup>51</sup> proof of such race-based differences included evidence of a nature-inscribed, black “bestial” character.<sup>52</sup> Scientific proof of this kind served to confirm black inferiority, justify racial slavery, excuse Jim Crow segregation, and prohibit interracial marriage.<sup>53</sup> The framing of blackness in terms of the white supremacist tropes of subhuman inferiority and bestial violence legitimated the stereotypical coding and subordination of racial identity bound up in the vision of the Old Negro.

***B. Coding Blackness: Stereotype and Subordination***

Gates assembles the Jim Crow vision of the Old Negro from the white supremacist tropes, narratives, and images permeating the writings of natural and social scientists, journalists, politicians, and academics. Within the Redeemer imagination, that stereotypical vision oscillated between two figurative poles of subjugation. At one rhetorical pole, Gates pinpoints, the Old Negro appeared as a “fanciful creature of plantation literature and proslavery propaganda who thrived under slavery, and then, once slavery ended, pined for its return[.]”<sup>54</sup> At the other rhetorical pole, by contrast, the Old Negro epitomized “the uneducated, landless former slaves who, through no fault of their own, had failed to thrive under freedom, had failed to ‘rise,’ as the black middle class would put it.”<sup>55</sup>

Building on the subjugating Old South folklore myths of the “degraded” and “degenerate” plantation Negro, the popular vision of New South Redeemers “portray[ed] black people in a chronic state of childlike dependence.”<sup>56</sup> For apologists of the New South, Gates observes, the *natural* state of black dependence, rather than government-sanctioned racial discrimination or Ku Klux Klan-incited antiblack vigilante violence, produced the main source of the post-Civil War “Negro Problem.”<sup>57</sup> Viewed as beyond the curative reach of “black leadership” and “black self-determination,” the “Negro Problem” gave rise to the mutated ideology of white supremacist paternalism.<sup>58</sup> The paternalism of white supremacy,<sup>59</sup> Gates remarks, “morally obligated” white Americans to intervene in the private and semi-public spheres of the black family and the black community to *save* the race, “to step in and solve the so-called Negro Problem *for* the Negro, not *with* him.”<sup>60</sup> Put simply, New South Redeemers and their Northern counterparts believed “African

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<sup>50</sup> *Id.* at 56.

<sup>51</sup> For useful studies of the eugenics movement, see ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016); GREGORY MICHAEL DORR, *SEGREGATION’S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA* (2008); VICTORIA F. NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* (2008).

<sup>52</sup> GATES, *supra* note 8, at 59.

<sup>53</sup> *Id.* at 56-79.

<sup>54</sup> *Id.* at 187.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 91.

<sup>57</sup> *Id.* at 80.

<sup>58</sup> *Id.*

<sup>59</sup> On racial paternalism in civil rights and poverty law, see Anthony V. Alfieri, *Paternalistic Interventions in Civil Rights and Poverty Law: A Case Study of Environmental Justice*, 112 MICH. L. REV. 1157 (2014) (book review).

<sup>60</sup> GATES, *supra* note 8, at 80 (emphasis in original).

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Americans were unequipped to be the masters of their own destiny.”<sup>61</sup>

For Gates, the Redemption era genre of plantation literature imprinted the tropes, narratives, and images of the Old Negro in American popular culture. Inspecting the archival material of advertisements, postcards, and trade cards, the blackface minstrelsy of theater and vaudeville, and the stereotyped identity of black characters in early films,<sup>62</sup> Gates documents the fabrication of an “infantile, easily led, insensate, yet dangerously brutal” black cultural figure.<sup>63</sup> Depicted as “biologically inferior at best, a separate species at worst,”<sup>64</sup> that iconic figure in plantation folklore fueled the myth of the Negro’s “nostalgia for her or his own enslavement.”<sup>65</sup> Gates’s meticulous documentation of the status denigration of the African-American community through mass-produced representations of freedmen and freedwomen as *children* to be “led, nurtured,” and “controlled” elucidates the historical projection of the nineteenth century “antebellum past” onto the twentieth century “Redemptionist present,”<sup>66</sup> creating a *double vision* crucial to the restoration of racial hierarchy in law, economic, politics, and society.<sup>67</sup>

Extending his examination of the Old Negro figure represented in Jim Crow imagery, narrative, and science, Gates scrutinizes a malign assemblage of Southern Redeemer-manufactured stereotypes employed during the post-Reconstruction era to transform freed black people from “speaking” *citizen-subjects* into “muzzled” *subcitizen-objects* reduced to a condition of “nominal freedom,” a state of “virtual neo-slavery.”<sup>68</sup> Propelled by multifarious white supremacist cultural, political, and historical discourses, that transformation “unfolded” for Gates in “paired or binary constructs” and “fused, Janus-faced opposites” — “power and helplessness, fantasy and repugnance, desire and rejection, attraction and repulsion, seduction and violation, beauty and the bestial, the sublime and the grotesque.”<sup>69</sup> This false, objectifying dialectic converged “within the larger, convoluted frame of the monstrous depravity and licentiousness of slavery.”<sup>70</sup> The upshot of this transformative, cultural construction took the form of Sambo art, a fixed set of popular signs and symbolic representations of black men and women embodying “all that was the reverse of Truth and Beauty, the Good and the Civilized.”<sup>71</sup>

To Gates, the stereotypical images of Sambo art generated “everyday numbingly repeatable tropes of white supremacy that could be readily consumed and digested, processed and internalized,” both consciously and unconsciously.<sup>72</sup> The debased, nineteenth century byproduct of this offensive genre of racial caricature was “an imaginary ‘Negro,’” a single, unchangeable black image stripped of “humanity.”<sup>73</sup> Gates ties this culturally denigrating image to the status portrayal of newly freed slaves, especially black males, as gluttons, thieves, sexual predators, and

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<sup>61</sup> *Id.* at 80.

<sup>62</sup> *Id.* at 104-07.

<sup>63</sup> *Id.* at 91.

<sup>64</sup> *Id.* at 95.

<sup>65</sup> *Id.* at 97 (footnote omitted).

<sup>66</sup> *Id.* at 101, 103.

<sup>67</sup> *Id.* at 104.

<sup>68</sup> *Id.* at 126.

<sup>69</sup> *Id.* at 126 (footnote omitted)

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 126.

<sup>72</sup> *Id.* at 128.

<sup>73</sup> *Id.* at 128, 129.

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rapists — in sum, as “ruthless, homicidal black savage[s].”<sup>74</sup> The sheer mass of Sambo art, and its negative racist imagery, worked to “naturalize the visual image of the black person as subhuman,” and, at the same time, “subliminally reinforce the perverted logic of the separate and unequal system of Jim Crow itself.”<sup>75</sup> Gates describes the meaning-making, cultural practice of Sambo art as a kind of “xenophobic masking,”<sup>76</sup> a practice that sparked the counterposing effort of the Harlem Renaissance to reimagine the American Negro’s “mask of blackness” in the figure of the New Negro.<sup>77</sup>

### C. Reframing Blackness: Agency and Power

From the outset of *Stony the Road*, Gates maintains that the concept of a New Negro stood on unsteady ideological ground and “embedded its own critique.”<sup>78</sup> More vexing for Gates, despite multiple iterations over a thirty-year period ranging from 1894 to 1925, the tropes, narratives, and images of the New Negro failed to spur the formulation of a politics of black progress and equal rights.<sup>79</sup> Bemoaning this failure, Gates asserts that “Black America” did not in fact *need* a New Negro.<sup>80</sup> Instead, he emphasizes, Black America “needed the legal and political means to curtail the institutionalization of antiblack racism perpetuated against the Old Negro at every level in post-Reconstruction American society through . . . the ideology of white supremacy.”<sup>81</sup>

To Gates, cultural constructions like the New Negro, though itself a form of black agency, falter when “not built on or allied with political agency,”<sup>82</sup> even when put forward as “an act of self-defense and psychic resilience,”<sup>83</sup> for instance during the two decades of the Harlem Renaissance from 1925 to 1935. Without the steadying ground of political agency expressed in black resistance to white supremacy and black activism for equal rights, Gates warns, such constructions are “destined to remain exactly what they’d started as: *empty signifiers*.”<sup>84</sup> Rather than attempt to imbue the concept of the New Negro with stable, essentialist meaning, Gates endorses *actual* political agency and engagement — captured by the foundational act of voting and democratic participation — as a more productive means of enhancing civil rights than “declaring the birth of a ‘new’ sort of black person” or manipulating “the image of ‘the race.’”<sup>85</sup> However important to the early twentieth century African-American canon of art and literature, the short-lived history of the Harlem Renaissance illustrates the strategic error of overreliance on the discursive and symbolic formation of alternative racial tropes, narratives, and images without the bolstering weight of political agency, institution

<sup>74</sup> *Id.* at 145. Gates describes “the creation of the white racist fiction of the unbridled, incorrigible, depraved heterosexuality of the black male,” later “refigured as the congenitally inveterate rapist, projected onto black male human beings, trapped by their ‘nature’ in a permanent state of lust, poised to violate, unpredictably and spontaneously, the purity and sanctity of white virginal womanhood.” *Id.* at 146.

<sup>75</sup> *Id.* at 130.

<sup>76</sup> *Id.* at 132.

<sup>77</sup> *Id.* at 133.

<sup>78</sup> *Id.* at 248.

<sup>79</sup> *Id.* at 250-55.

<sup>80</sup> *Id.* at 253.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 256.

<sup>84</sup> *Id.* at 253 (emphasis added).

<sup>85</sup> *Id.* at 253, 256, \_\_\_\_\_. See also EDDIE S. GLAUDE, JR., *BEGIN AGAIN: JAMES BALDWIN’S AMERICA AND ITS URGENT LESSONS FOR OUR OWN* (2020).

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building, and movement power.

Significantly, Gates treats the invention of the concept of the New Negro as an identity-based, form of *reconstruction*.<sup>86</sup> Admittedly, more cultural than political, that style of reconstruction nevertheless ignited a vibrant movement in the arts. Yet, Gates discerns an inexorable futility in the “metaphorical” reconstruction of a “new” kind of black person,<sup>87</sup> the futility of attempting to transform the cultural image of the “upper classes of race” persistently denigrated, and violently suppressed, across the Redeemer South and the segregated North.<sup>88</sup> For Gates, this “leadership class” of New Negroes — “young, educated, post-slavery, modern, culturally sophisticated, and thoroughly middle class” — emerged and coalesced precisely around the need to defend the race against Redemptionist attack in the aftermath of Reconstruction.<sup>89</sup>

Gates concedes that the leadership at the forefront of the New Negro movement of black “self-(re)invention” renewed “age-old class divisions within the black community.”<sup>90</sup> Cross cutting the lines of class, caste, and color,<sup>91</sup> he explains, those divisions arose out of “distinctions within the slave community between house and field, between enslaved people by occupation, and between mixed-race descendants of white fathers (and, to a much lesser extent, white mothers) and those without white ancestry.”<sup>92</sup> The sharpening line dividing descendent classes of Negro slavery, Gates mentions, indicated the mounting perception that “all black people weren’t exactly alike.”<sup>93</sup> Increasingly, he concedes, “class mattered within the race.”<sup>94</sup>

Gates charts the evolving notion of a differentiated and privileged black elite — W.E.B. Du Bois’s borrowed trope of “The Talented Tenth”<sup>95</sup> — openly and volubly committed to the “valorization of ‘respectability.’”<sup>96</sup> For Gates, the New Negro cultural discourse of respectability, publicly enunciated in black women’s clubs, church sermons, and black press editorials, strived to show that black elites “were superior to the mass of black people and equal to the best of white America.”<sup>97</sup> On this yardstick of social mobility, insofar as black elites outwardly embodied the same “social and moral Victorian values and aspirations” of the white middle class, they deserved “equal treatment in every way.”<sup>98</sup> This New Negro era politics of respectability, Gates comments, twisted “the embrace of white Victorian middle-class social and moral values”<sup>99</sup> toward the promotion of conservative values of racial “‘progress’” and “‘elevation,’” values deliberately propagated by “college-educated black upper class” leaders to counter racist caricatures and stereotypes of “genetically immoral, licentious, and degenerate” black people.<sup>100</sup>

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<sup>86</sup> GATES, *supra* note 8, at 186.

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.* at 186.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 190.

<sup>91</sup> On the continuing lines of caste-based racial hierarchy in American society, see Isabel Wilkerson, *America’s Enduring Caste System*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html>.

<sup>92</sup> GATES, *supra* note 8, at 188.

<sup>93</sup> *Id.* at 190.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 191 (footnote omitted).

<sup>96</sup> *Id.* at 193.

<sup>97</sup> *Id.* at 193–94.

<sup>98</sup> *Id.* at 194.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 194–95.

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To Gates, the New Negro movement's espousal of a politics of respectability to dispel the "primitivist" stereotypes (crime, immorality, and laziness) of Sambo art and to construct an alternative culture of racial assertiveness, self-determination, and self-empowerment rested in part on the adoption of Du Bois's stance of "double consciousness."<sup>101</sup> That critical stance recognized the dual, often incompatible, construction or projection of racial identity from both inside and outside the black community.<sup>102</sup> Gates shows that this interpretive stance, though vital, failed to overcome the class-blind laws and social practices of Jim Crow segregation and subordinate citizenship, notwithstanding the increasing caste and color differentials stratifying black social classes. Those class differentials, he adds, referenced "color, hair texture, place of origin (the North or the South), parents' profession, education, genetic admixture, even when one's black ancestors gained their freedom."<sup>103</sup>

The intraracial tensions roiling the cultural politics of respectability, Gates suggests, inhibited the ability of the New Negro movement to develop a full-blown, antiracist politics of militant, self-assertive resistance, perpetuating the very tropes, narratives, and images of the Old Negro initially spurring the movement.<sup>104</sup> More restrained, he remarks, the New Negro "black establishment" practiced the political efficacy of institution building, civil protest, and law reform.<sup>105</sup> In lieu of an explicit theory of politics, he observes, the New Negro movement veered toward the creation of art and literature as a "strategic weapon" in the pursuit of civil rights, albeit an art devoid of the disavowed folklore and spirituals of the Old Negro.<sup>106</sup> Despite the cultural importance of the Harlem Renaissance and the subsequent Black Arts Movement, Gates notes that the resulting separation of arts and politics condemned Old Negroes, New Negroes, and their successor class figurations to a form of "racial survival" typified by creative, collective self-definition, rather than economic or social equality.<sup>107</sup> For white supremacists, this legacy ensured that "before the law at all times, there was never an Old Negro and a New Negro; there were only Negroes."<sup>108</sup>

Gates's account of the New Negro and the Harlem Renaissance offers civil rights, criminal justice, and poverty lawyers a means of reframing racial identity through a counter narrative of black agency and assertiveness, rights empowerment, and resistance. Reframing links this counter narrative to the freedom petitions of the antebellum era,<sup>109</sup> the citizenship battles of the Reconstruction era,<sup>110</sup> and the civic self-defense, institution building, and political power struggles of the civil rights and Black Lives Matter movements. Many of us who collaborate with

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<sup>101</sup> *Id.* at 198 (footnote omitted).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 205.

<sup>104</sup> *Id.* at 205-14.

<sup>105</sup> *Id.* at 213.

<sup>106</sup> *Id.* at 218.

<sup>107</sup> *Id.* at 231.

<sup>108</sup> *Id.* at 232.

<sup>109</sup> Anthony V. Alfieri, *Resistance Songs: Mobilizing the Law and Politics of Community*, 93 TEX. L. REV. 1459 (2015) (reviewing LEA VANDERVELDE, *REDEMPTION SONGS: SINGING FOR FREEDOM BEFORE DRED SCOTT* (2014)); see generally MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

<sup>110</sup> Gates discerns the "hallmarks of citizenship" in private and public behavior that confirmed African Americans "were capable of organizing for elections, cultivating land, forming stable social and cultural institutions, marrying, functioning as members of families, raising children, and suing in court to defend their rights . . ." GATES, *supra* note 4, at 130.



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communities of color in our teaching and research regularly witness sustained, forceful expressions of civic self-defense, institution building, and political power in the advocacy and organizing work of neighborhood civic associations, church congregations, and tenant-and-homeowner groups. Witnessing black *led* local advocacy campaigns counters the dehumanizing framing effect of white supremacist tropes and images, recasts the stereotypical coding and subordination of racial identity, and reframes black agency and power, enabling communities — rather than their lawyers — to define “who and what a ‘Negro’ is.”<sup>111</sup>

## II. Lawyering Racialized Narratives and Racially Subordinating Visions

Gates’s historical lessons of the framing effect of white supremacist tropes and images, the stereotypical coding and subordination of racial identity, and the reframing of black agency and power are instructive for civil rights, criminal justice, and poverty lawyers. Unsurprisingly, lawyers working in these fields see and hear the racialized narratives and racially subordinating visions of the Redemption and Jim Crow eras across the American socio-legal landscape in courtrooms, legislative halls, law school classrooms, and the media. When truncated, they take the form of spoken tropes (black “looters”<sup>112</sup> or “the drug-crazed Negro”<sup>113</sup>) and visual images (criminal mugshots<sup>114</sup> and courthouse murals<sup>115</sup>). When expanded, they occupy the longer, thicker form of stories and storytelling. Civil rights and poverty lawyers tell stories of racial *inferiority* and chronic *dependence*. Prosecutors and public defenders tell stories of racial *pathology* and *dangerousness*.<sup>116</sup> Both stigmatizing and silencing in effect, such identity-inscribing tropes, images, and stories carry their own natural and necessary logic. That logic shapes the reasoning and role of lawyers, the relationship between lawyers and clients, and the process of lawyering itself, including its methods, scope, and objectives.

### A. Racial Construction in the Lawyering Process

In civil rights, poverty law, and criminal cases, the lawyering process serves as a rhetorical site for constructing racialized narratives and racially subordinating visions of client, group, and community identity. Narrative construction in the familiar tropes and images of race, often coupled with class, gender, and sexuality, occurs through the client-centered practices of interviewing, fact investigation, and counseling, as well as the court-centered practices of pretrial, trial, and appellate

<sup>111</sup> GATES, *supra* note 8, at xvii.

<sup>112</sup> Robin D. G. Kelley, *What Kind of Society Values Property Over Black Lives?*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/opinion/george-floyd-protests-looting.html>.

<sup>113</sup> Carl L. Hart, *We Know How George Floyd Died. It Wasn’t From Drugs.*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/george-floyd-toxicology-report-drugs.html>.

<sup>114</sup> See SHAWN MICHELLE SMITH, PHOTOGRAPHY ON THE COLOR LINE: W. E. B. DU BOIS, RACE, AND VISUAL CULTURE (2004); PICTURES AND PROGRESS: EARLY PHOTOGRAPHY AND THE MAKING OF AFRICAN AMERICAN IDENTITY (Maurice O. Wallace & Shawn Michelle Smith, eds. 2012).

<sup>115</sup> See A. LEON HIGGINBOTHAM JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 132 (1998).

<sup>116</sup> For examples of the stereotypical tropes of black dangerousness and criminal pathology in current American politics, see Maggie Haberman & Jonathan Martin, *With Tweets, Videos and Rhetoric, Trump Pushes Anew to Divide Americans by Race*, N.Y. TIMES, June 24, 2020, at A21 (“Trailing in national polls and surveys of crucial battleground states, and stricken by a disappointing return to the campaign trail, Mr. Trump has leaned hard into his decades-long habit of falsely portraying some black Americans as *dangerous or lawless*.”) (emphasis added).

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advocacy. Pretrial practices include pleadings and motions. Trial practices encompass opening statements and closing arguments, direct and cross examinations, and evidentiary submissions and objections. Appellate practices incorporate petition drafting, brief writing, and oral argument into the lawyering process.

Representing people of color in civil rights, poverty law, and criminal cases exposes the interlaced antebellum and postbellum, racialized roots of routine discursive and performative advocacy practices. Examples of these practices are *visible* in pleadings, memoranda, and briefs describing black accused offenders and victims of discrimination as subhuman, inferior, bestial, uneducated, childlike, infantile, helpless, immoral, licentious, and lazy or as thieves, predators, and savages. Consider the Redemption era lexicon of immorality and violence featured in the 2019 brief of the Fort Bend County District Attorney's Office filed in opposition to the petition of Terence Tramaine Andrus for a writ of certiorari from the U.S. Supreme Court in *Andrus v. Texas*.<sup>117</sup> Summarizing the evidence presented by prosecutors during the penalty phase of Andrus's 2012 capital trial, the brief stated that Andrus's "aggressive and assaultive behavior" as a teenager in a youth facility caused him to be transferred to an adult prison "*because he did not progress in rehabilitation and because he was so violent and disruptive.*"<sup>118</sup> Examples of these same practices are *audible* in lay and expert witness testimony elicited in pretrial and trial proceedings. Testimony succumbs to racialized narratives when it describes the past, present, or future behavior, character, and credibility of black accused offenders and victims of discrimination in generalized, race-based anecdotal, scientific, or statistical terms associated with debased group cultural and social histories. Testimony conjures up imagery of racially subordinating visions when it depicts individuals, groups, and whole communities of color in terms of demeaning racial caricatures and stereotypes.

In *Stony the Road*, Gates catalogues the discourses of racial science as a white supremacist storehouse supplying legitimacy to past and present racialized narratives and racially subordinating visions. For Gates, the objective, essentialist claims of nineteenth century racial science positing innate, biological differences between black and white populations furnished the hard evidence required to validate the judgment of black inferiority, the linchpin upholding antebellum slavery and postbellum Jim Crow segregation. To illustrate the modern lawyer deployment of racialized scientific discourse in the criminal defense context, specifically in the routine trial practices of witness direct examination and evidentiary admission, consider the U.S. Supreme Court's recent decision in the capital case of *Buck v. Davis*.<sup>119</sup>

### ***B. Racial Science in Criminal Defense Practice: Buck v. Davis***

Decided in a 2017 majority opinion delivered by Chief Justice Roberts and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, the Supreme Court in *Buck v. Davis* announced that Texas federal and state trial and appellate courts committed reversible error in allowing a court-appointed capital defense attorney to use expert testimony to portray his black client,<sup>120</sup> Duane Buck, and "black men" in general as "violence prone."<sup>121</sup> Addressing Buck's

<sup>117</sup> *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (granting petition for a writ of certiorari, vacating judgment of Texas Court of Criminal Appeals, and remanding the case for further proceedings).

<sup>118</sup> Opposition to Petition for a Writ of Certiorari at 8, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (No. 18-9674).

<sup>119</sup> 137 S. Ct. 759 (2017).

<sup>120</sup> *Buck v. Dretke*, No. H-04-3965, 2006 WL 8411481, at \*7 (S.D. Tex. July 24, 2006) ("Buck is African-American").

<sup>121</sup> 137 S. Ct. at 776 (citation omitted).

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1995 state trial, Roberts found that defense counsel called a court-appointed expert, Dr. Walter Quijano, to the witness stand, elicited prejudicial testimony linking Buck's race to an increased probability or likelihood of future violence, and put into evidence Dr. Quijano's expert report alleging that "Buck's race disproportionately predisposed him to violent conduct," in effect limning the inference that "the color of Buck's skin made him more deserving of execution."<sup>122</sup> A Texas jury subsequently convicted Buck of capital murder and sentenced him to death.<sup>123</sup>

Based on these trial conduct findings, Roberts concluded that defense counsel's introduction of Dr. Quijano's expert opinion correlating race and an increased propensity for violence violated Buck's Sixth Amendment right to the effective assistance of counsel under the standards of *Strickland v. Washington*<sup>124</sup> and his entitlement to relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure governing final judgments.<sup>125</sup> Roberts reasoned that Dr. Quijano's expert testimony and the jury's response to that testimony, evidenced by its request and receipt of the admitted "psychology reports" at issue, made "clear that Buck may have been sentenced to death in part because of his race."<sup>126</sup> Roberts explained that "when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record."<sup>127</sup> On matters of race, he declared: "Some toxins can be deadly in small doses."<sup>128</sup>

Furthermore, Roberts admonished the federal and state courts below that the submission of Dr. Quijano's "offending evidence" by Buck's own lawyer was tantamount to "an admission against interest," and, as such, "more likely to be taken at face value" by a jury.<sup>129</sup> At Buck's trial, Roberts added, the adverse "effect was heightened due to the source of the testimony" — a medical expert who "held a doctorate in clinical psychology, had conducted evaluations in some 70 capital murder cases, and had been appointed by the trial judge (at public expense) to evaluate Buck."<sup>130</sup> For Roberts, "[n]o competent defense attorney would introduce such evidence about his own client."<sup>131</sup>

Roberts's colorblind insistence that federal and state courts purge Buck's trial of race-contaminated scientific evidence, and consequent attorney-induced prejudice, echoes Gates's reproof of white supremacist-tainted racial science. Sounding a similar rebuke, Roberts denounced defense counsel's introduction of "hard statistical evidence" to show that Buck's immutable characteristic — the color of his skin — increased the probability of "future violence."<sup>132</sup> In language resonant of Gates, Roberts protested that the proffer of scientific evidence rekindled a "powerful racial stereotype" of black male bestial violence, reviving "a particularly noxious strain of racial prejudice" in American legal history.<sup>133</sup>

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<sup>122</sup> *Id.* at 775.

<sup>123</sup> *Id.* at 767–68.

<sup>124</sup> 466 U.S. 668 (1984).

<sup>125</sup> 137 S. Ct. at 777–78, 780.

<sup>126</sup> *Id.* at 769 (citation omitted), 778.

<sup>127</sup> *Id.* at 777.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (citation omitted).

<sup>131</sup> *Id.* at 775.

<sup>132</sup> *Id.* (citation omitted).

<sup>133</sup> *Id.* at 776.

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For Roberts, however, once the prejudicial stain of racialized scientific evidence is erased from the penalty phase of a capital trial, its witness-tainted source removed and its harm procedurally rectified, courts automatically recover their race-neutral equilibrium and factfinders (judges and juries) preternaturally regain their colorblind posture. On this analysis, the racialized narratives and racially subordinating visions of the Redemption and Jim Crow eras documented by Gates exert no lingering hold on contemporary judges or lawyers outside of anomalous incidents marked by unanticipated errors of advocacy or adjudicative judgment. In this way, for Roberts, *Buck v. Davis* presents an aberrational, rather than a typical, example of criminal advocacy and adjudication, its trial conduct unusual, its procedural errors uncharacteristic, and its lawyering exceptional for its ineffectiveness. But for such singular circumstances and extraordinary errors, Roberts implicitly claims, federal and state courts otherwise ably manage colorblind, impartial processes of advocacy and adjudication seldom tainted by discrete instances of racial prejudice or larger patterns and practices of systemic racism.<sup>134</sup> Where sporadic incidents of racial prejudice unexpectedly arise in spite of the colorblind, institutional commitments of judges and lawyers, Roberts insists, courts can simply command public and private actors to “stop discriminating on the basis of race.”<sup>135</sup>

In contrast, for law students, lawyers, and judges instructed by Gates, there is no race-neutral space or race-less stance in American law, culture, and society. And there are no colorblind, remedial commands or race-neutral, safe harbors. Enmeshed in centuries of racialized tropes, narratives, and images, and likewise entangled in long-standing economic and social relations of racial hierarchy, judges, juries, witnesses, and lawyers themselves *always* perceive and interpret the world through the cognitive prism of race, caste, and color.<sup>136</sup> To that extent, for Gates-trained lawyers, *Buck v. Davis* presents a commonplace, rather than an unusual, fact-finding inquiry — namely, the criminal inquiry of *black male future dangerousness*, a freighted space rife with the hazard of racial character inference. That artifactual space is central to the white supremacist construction of the black male as a “ruthless, homicidal black savage.”<sup>137</sup> While Roberts classified the jury determination of Buck’s future dangerousness as a “predictive judgment inevitably entailing a degree of speculation” but securely cabined by judicial supervision and adversary truth-seeking competition, Gates’s account of Reconstruction treats that determination as a recurrent historical judgment compelled by the Southern Redeemer mythology of the biologically inferior, dangerously brutal black male cultural figure and the immutable color of Buck’s skin.<sup>138</sup>

<sup>134</sup> On patterns and practices of systemic racism in federal courts, *Bloomberg Law* recently reported that only “one of Trump’s 53 confirmed [federal] appeals court judges is Hispanic and none are Black.” Madison Alder & Jasmine Ye Han, *Trump Nears Post-Nixon First: No Black Circuit Judges*, BLOOMBERG LAW (updated June 25, 2020, 1:44 PM), <https://news.bloomberglaw.com/us-law-week/no-black-judges-among-trumps-appeals-court-confirmations>.

<sup>135</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>136</sup> Consider, for example, the recent suspension of Allegheny County Pennsylvania Common Pleas Judge Mark V. Tranquilli “after being accused of referring to a black female juror as ‘Aunt Jemima’ repeatedly in comments he made in his chambers following the acquittal of a drug suspect” in January, 2020. *See Judge Accused of Calling Juror ‘Aunt Jemima’ Suspended*, ASSOCIATED PRESS (Feb. 6, 2020), <https://apnews.com/b86041be7ddad8a6008e65379dc5bfe6>. (“Judge Mark Tranquilli was suspended after being accused of referring to a black female juror as ‘Aunt Jemima’ repeatedly in comments he made in his chambers following the acquittal of a drug suspect on Jan. 24.”). *See also* *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019) (finding state prosecutorial “pattern of factually inaccurate statements about black prospective jurors”).

<sup>137</sup> GATES, *supra* note 8, at 145.

<sup>138</sup> *Buck*, 137 S. Ct. at 765.

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On Gates's historical account, contrary to Roberts, the trope of *black male future dangerousness* stands cabined only by the bounds of the white supremacist imagination and the counterweight of black ideological resistance in law and politics. Normally unbounded, the narratives and images of *black male future dangerousness* typically spatter across law, culture, and society, sully even the most mundane criminal proceedings, for example, bail, probation, and parole hearings. Roberts's failure to grasp the enduring racialized meaning of future dangerousness, especially *black male future dangerousness*, and confront the cultural bias structurally implicit in its recurring and widespread determination in police street-level surveillance, prosecutorial charging, plea bargaining, and judicial sentencing, demonstrates the limits of his colorblind jurisprudence. That failure is aggravated by Roberts's unwillingness to connect the ineffective trial assistance of Buck's defense counsel<sup>139</sup> to systemic funding, staffing, and training deficiencies in state access to justice programs designed to aid accused and convicted criminal offenders, racially disparate structural deficiencies that undermine the constitutional integrity of capital punishment proceedings. Additionally, that failure is compounded by Robert's refusal to acknowledge the explicit racist practices of judges, prosecutors, public defenders, and private attorneys operating in state criminal justice systems.<sup>140</sup> The next part evaluates the conduct of Buck's trial attorney and the conduct of prosecutors, public defenders, and civil rights lawyers more broadly, against the backdrop of purportedly race-neutral lawyering process and legal ethics traditions.

### III. Colorblind Lawyering Process Traditions and Legal Ethics Regimes

Colorblind lawyering process traditions and legal ethics regimes permit criminal prosecutors and public defenders as well as civil rights and poverty lawyers to borrow from the white supremacist tropes, narratives, and images of the postbellum periods of Redemption and Jim Crow segregation in crafting their litigation strategies and trial tactics. Framing case narratives and client stories in racialized tropes and images enables lawyers to *race-code* or stereotype the identity of accused and convicted offenders, impoverished claimants, and victims of discrimination in ways that may advance a client's public or private interests and objectives but diminish the agency, dignity, and power of an individual, a group, or a community client of color. Predicated on the logic of a natural social order of race-based hierarchy or, alternatively, on the allegedly race-neutral necessity of aggressive advocacy and paternalistic intervention, lawyering process and legal ethics conventions tolerate the use of racially subordinating narratives in civil and criminal justice advocacy.

To be sure, neither the managerial tolerance of courts nor the regulatory tolerance of bar associations is without limits in matters of race and advocacy. Courts condemn the racially charged remarks, questions, and arguments of counsel at trial<sup>141</sup> and ban racial discrimination from the

<sup>139</sup> But see Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES: SIDEBAR (May 17, 2010), <http://www.nytimes.com/2010/05/18/us/18bar.html>.

<sup>140</sup> See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom* 126 YALE L.J. 862 (2017) (reviewing NICOLE VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016)).

<sup>141</sup> *Calhoun v. United States*, 568 U.S. 1206, 1136–38 (2013) (Statement of Sotomayor, J.) (denying petition for writ of certiorari); *People v. Robinson*, 459 P.3d 605, 607–08 (Colo. App. Ct. 2017), *rev'd and remanded*, 454 P.3d 229 (Colo. 2017) (criticizing prosecutor's opening statement reference to the accused black male offender's "'dark penis going into a white body'").

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civil<sup>142</sup> and criminal<sup>143</sup> jury selection process. Moreover, in 2016, the American Bar Association (“ABA”) amended rule 8.4 of the Model Rules of Professional Conduct to prohibit “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”<sup>144</sup> Significantly, the amendment “does not preclude legitimate advice or advocacy” otherwise “consistent” with the Model Rules.<sup>145</sup>

Nonetheless, colorblind rhetoric pervades the language of lawyering process traditions<sup>146</sup> and legal ethics regimes, including the ABA’s 1908 Canons of Professional Ethics,<sup>147</sup> 1969 Model Rules of Professional Responsibility,<sup>148</sup> and the earlier 1983 version of the Model Rules of Professional Conduct.<sup>149</sup> Spoken in courthouses, classrooms, and clinics, that colorblind language still suffuses the curricular texts of experiential skills courses and continuing legal education seminars even while they increasingly integrate cross-cultural habits of seeing, hearing, and speaking into lawyering process training regimens.<sup>150</sup> Despite this growing integration, the bleached out, perspectiveless stance of colorblind lawyering and ethics persists.<sup>151</sup>

### A. Colorblind Lawyering Process Traditions

Colorblind lawyering process traditions define both client- and court-centered practices in terms of neutral skills and mechanical techniques. Upon this definition, the practices of advising, advocating, negotiating, and evaluating a client’s legal affairs comprise race-free, quasi-scientific methodologies and transferable bodies of knowledge acquired through education, mentoring, and training. As such, those skill-based methodologies and bodies of knowledge can be taught in classrooms and clinical field placements, systematized in texts, and reproduced in simulation exercises. And, when rigorously applied and finely honed, they can obtain effective results across both litigation and transactional contexts. In this way context transcendent, the formal

<sup>142</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

<sup>143</sup> *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019) (noting state prosecutorial pattern of striking black prospective jurors and dramatically disparate questioning and treatment of black and white prospective jurors).

<sup>144</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2017). For legislative history, see Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 810–11 (2019).

<sup>145</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2017).

<sup>146</sup> See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELSH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); THE MACCRATE REPORT (Joan S. Howland & William H. Lindberg eds., 1994); AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM* (1992).

<sup>147</sup> CANONS OF PROF’L ETHICS (AM. BAR ASS’N 1908).

<sup>148</sup> MODEL CODE OF PROF’L RESPONSIBILITY (AM. BAR ASS’N 1969) (“Model Code”).

<sup>149</sup> MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983) (“Model Rules”).

<sup>150</sup> See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyering*, 8 CLINICAL L. REV. 33 (2001); Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and A Sketch of A Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131 (2006); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (2002); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369 (2005).

<sup>151</sup> See Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. REV. 345 (1997); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1511–17 (1998).

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methodologies of the lawyering process appear generalizable in case application independent of client class, race, gender or sexual identity.

Consider, for example, the lawyering methodologies of interviewing, investigation, and drafting at work in the appellate representation of Terence Tramaine Andrus by capital defense counsel in *Andrus v. Texas*,<sup>152</sup> particularly the preparation of his petition for a writ of certiorari from the Supreme Court.<sup>153</sup> Constrained by the tenets of colorblind advocacy, capital appellate counsel omitted direct mention of Andrus's race or ethnicity in his petition, instead referencing the fact that Andrus "was born in 'Jefferson Davis Hospital' in the historically *African-American* Third Ward neighborhood of Houston in 1988" and, moreover, the fact that the "State had struck virtually all *African-Americans* and Hispanics from the qualified venire pool."<sup>154</sup> This deft, twin reference conformed to colorblind convention and, at the same time, provided a useful cultural and social narrative to better understand Andrus's history and the trial proceeding below. At the same time, the petition added that Andrus, upon his release from prison at the age of eighteen, "was taken in by a couple from the old Third Ward neighborhood who (unlike his mother) was willing to help him. He followed their rules, helped around the house, and diligently looked for work. But when the father of the house was sent back to prison, Andrus was turned out."<sup>155</sup> Although once again adhering to colorblind tradition, this second more troubling narrative veered toward the New South Redeemer trope of black *chronic childlike dependence*. For Redeemers, the narrative of the *infantile yet dangerously brutal* black figure framed the Negro Problem and gave rise to the white paternalistic obligation of leading, nurturing, and controlling unequipped freedpeople.

Capital appellate counsel's entanglement with white supremacist Redeemer narratives in defending Andrus demonstrates the lawyer tendency to treat a black offender or a victim of discrimination as an imaginary Negro — Gates's subcitizen-object — constructed for the purposes of effective advocacy, rather than as a citizen-subject allied for the purposes of political agency. Entrenched in the founding canonical texts of clinical legal education, this tendency to favor the construction of primitivist racial stereotypes over the construction of an alternative advocacy culture of racial assertiveness, self-determination, and self-empowerment obscures the need to engage with core group and community identity issues, even in capital trials. Discounting the cultural, social, and political import of group and community identity deforms our understanding of impoverished clients and communities of color.<sup>156</sup>

Within the colorblind, skill-centered framework of legal education, our understanding is further distorted by the belief that client racial identity is *either* something easily discoverable *or*, more disturbing, something pathologically absent (because subhuman) and, hence, instrumentally adaptable. If discoverable as a naturally ingrained or structurally determined quality of personhood, then client racial identity lacks full agency. If absent or stunted in its quality of personhood and, therefore, situationally adaptable, then client racial identity falls subject to lawyer paternalistic control and manipulation, once again lessening full agency. In each of these senses, racial identity is an expedient figuration, its pragmatic form and content dictated by the tactical and strategic calculus of lawyer advocacy.<sup>157</sup>

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<sup>152</sup> 140 S. Ct. 1875.

<sup>153</sup> Petition for Writ of Certiorari at 2, 4, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (No. 18–9674).

<sup>154</sup> *Id.* at 2, 7 (emphasis added).

<sup>155</sup> *Id.* at 2, 4.

<sup>156</sup> Anthony V. Alfieri, *The Poverty of Clinical Canonic Texts*, 26 CLINICAL L. REV. 53, 54 (2019) (footnotes omitted).

<sup>157</sup> *Id.* at 62 (footnotes omitted).

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*B. Colorblind Legal Ethics Regimes*

Bracketed to the foundational notions of specialized professional knowledge, technical skill, and paternalistic discretion, colorblind legal ethics regimes permit lawyers largely to dictate the means and tactics used to accomplish a client's objectives in civil rights, criminal, and poverty law cases.<sup>158</sup> Colorblind ethics regimes, for example the ABA Model Rules, constrain this strategic discretion only under two conditions: first, if the lawyer conduct proves "prejudicial to the administration of justice;"<sup>159</sup> and second, if the lawyer "knows or reasonably should know" that the conduct constitutes "discrimination on the basis of race" and arises in a matter "related to the practice of law."<sup>160</sup> Discrimination on this valence includes any "harmful verbal or physical conduct that manifests bias or prejudice towards others."<sup>161</sup> Again, this narrowly tailored restriction "does not preclude legitimate advice or advocacy."<sup>162</sup> Legitimate advocacy extends to the lawyer trial use of peremptory challenges in jury selection, even when exercised on a discriminatory basis.<sup>163</sup>

The colorblind rhetoric of lawyering process traditions and legal ethics regimes veils the white supremacist tropes, narratives, and images that frame the legal consciousness of prosecutors, public defenders, and civil rights and poverty lawyers, and accordingly, shape the roles, mediate the relationships, and organize the methods of civil and criminal justice advocacy. Trials provide the chief forum for the introduction of such tropes, narratives, and images for lawyers, judges, jurors, and even witnesses in the guise of *race-coding*. At trial and on appeal, race-coding stereotypes the identity of accused and convicted offenders, impoverished clients, and victims of discrimination in ways that adversely affect their agency and dignity, and the agency and dignity of their communities.

Recall the penalty phase of the capital trial in *Buck v. Davis* when Duane Buck's trial attorney called Dr. Walter Quijano to the stand as an expert witness to testify regarding "the 'statistical factors' he had 'looked at in regard to this case.'"<sup>164</sup> Consonant with his admitted expert report, Dr. Quijano testified that race was "'know[n] to predict future dangerousness.'"<sup>165</sup> On cross-examination, the Harris County prosecutor questioned Dr. Quijano about the role of race referenced in his report.<sup>166</sup> In specific, the prosecutor asked: "You have determined . . . that the race factor, black, increases the future dangerousness . . . is that correct?"<sup>167</sup> Dr. Quijano answered:

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<sup>158</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 2020).

<sup>159</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2020).

<sup>160</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). Under the ABA Model Rules, "[a] trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS'N 2020).

<sup>161</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020).

<sup>162</sup> *Id.*

<sup>163</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2020) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).").

<sup>164</sup> *Buck*, 137 S. Ct. at 769 (citation omitted).

<sup>165</sup> *Id.* Additionally, Dr. Quijano testified: "It's a sad commentary . . . that minorities, Hispanics and black people, are over represented in the Criminal Justice System." *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*



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“‘Yes.’”<sup>168</sup> Later in closing argument, recounting expert testimony on Buck’s future dangerousness, the prosecutor stated: “‘You heard from Dr. Quijano . . . who told you that . . . the probability did exist that [Buck] would be a continuing threat to society.’”<sup>169</sup>

The prosecution and defense strategies in *Buck v. Davis* illustrate the routine crafting of race-coded tropes — *future dangerousness* and *continuing threat to society* — to describe accused black offenders under the aegis of colorblind lawyering process traditions and legal ethics conventions.<sup>170</sup> Notably, in *Andrus v. Texas*,<sup>171</sup> Justice Alito highlighted the race-coded tropes introduced by prosecutors in the form of aggravating evidence during the penalty phase of Andrus’s 2012 capital trial of in Fort Bend County, Texas.<sup>172</sup> In his dissenting opinion, joined by Justices Thomas and Gorsuch, Alito pointed to Andrus’s “violent record” and the “volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether in or out of prison.”<sup>173</sup> Remarking that Andrus “carried out a reign of terror in jail,” Alito credited lower court findings that Andrus “has a violent, dangerous, and unstable character; and that he is a threat to those he encounters.”<sup>174</sup> Strikingly, neither the *Andres* Court’s per curiam opinion nor Alito’s dissenting opinion mentions that Andrus is African American. Despite this silent, colorblind pretense, the race-code character tropes recapitulated by Alito in his description of Andrus distinctly echo the antebellum and postbellum tropes of an innately *bestial* and *dangerously brutal* black character well documented by Gates in *Stony the Road*.

Both prosecutors and defense attorneys justify their use of white supremacist tropes, narratives, and images under naturalistic and necessitarian rationales. The broad protection afforded the strategic discretion of “legitimate advice or advocacy” under ABA Model Rule 8.4 contemplates both rationales.<sup>175</sup> Naturalistic rationales appeal to an immutable social order, a chain of being, of race-based hierarchy. According to this hierarchical order, Duane Buck and Terence Tramaine Andrus, like other young black male offenders, are by nature inherently dangerous, violent, and a future threat to society. For the prosecutors and defense trial attorneys in *Buck v. Davis* and *Andrus v. Texas*, the vision of a natural racial order steering their race-coded trial conduct (examinations, submissions, and statements) offers a legitimate form of advocacy. For prosecutors and defense attorneys operating under a naturalistic rationale of this sort, casting

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> This habitual race-coding is also illustrated by the conduct of a Texas federal prosecutor at the 2011 federal drug conspiracy trial of an accused black offender, Bongani Charles Calhoun, in *Calhoun v. United States*. 133 S. Ct. at 1136. In his cross-examination of Calhoun, the prosecutor declaimed: “‘You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, *This is a drug deal?* . . . So what are they doing in this room with a bag full of money?’” *Calhoun v. United States*, Nos. SA-14-CA-15, SA-08-CR-351, 2014 WL 2723188, at \*3 (W.D. Tex. June 16, 2014) (quoting Assistant United States Attorney Sam L. Ponder) (emphasis added). See also *United States v. Cruz-Romero*, No. 1:13CR28-MHT, 2013 WL 4008669, at \*5 (M.D. Ala. Aug. 5, 2013) (criticizing witness testimony referencing “fleeing” Hispanics).

<sup>171</sup> *Andrus v. Texas*, 140 S. Ct. 1875, 1887–91 (2020) (granting petition for a writ of certiorari, vacating judgment of Texas Court of Criminal Appeals, and remanding the case for further proceedings).

<sup>172</sup> *Ex parte Andrus*, No. WR-84,438-01, 2019 WL 622783, at \*1 (Tex. Crim. App. Feb. 13, 2019), *cert. granted*, judgment vacated *sub nom.*, *Andrus v. Texas*, 140 S. Ct. 1875 (2020).

<sup>173</sup> 140 S. Ct. at 1887, 1889 (Alito, J., dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020). Under the ABA Model Rules, “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).” MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 2020).

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Duane Buck and Terence Tramaine Andrus as ruthless, homicidal black savages signals neither bias nor prejudice, instead it reflects a colorblind, objective truth.

Necessitarian rationales, by contrast, invoke the adversary system-derived duty of aggressive advocacy and the paternalism-deduced obligation of means-oriented intervention. Strongly backed by liberty interest norms, the duty of aggressive advocacy justifies starkly race-coded lawyer conduct in criminal cases directed toward accused offenders, witnesses, and even victims, overriding client and third-party dignity norms. Chronically paternalistic, the obligation of means-oriented intervention justifies ceding tactical and strategic decision making to lawyer discretion, overriding client participatory norms. In *Buck v. Davis*, the race-coded conduct of Duane Buck's trial attorney goes too far for the colorblind dogma of Chief Justice Roberts in evoking Gates's Redeemer trope of the *ruthless, homicidal black savage*. Decrying such egregious race-coding, Roberts complained: "It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race."<sup>176</sup> Yet, though his conduct in *Buck v. Davis* cannot be saved by necessitarian rationales of aggressive advocacy and strategic intervention, Buck's defense attorney can defend his conduct as a legitimate form of advocacy, however race-coded and prejudicial. Under the colorblind formalism of lawyering process traditions and legal ethics regimes, absent evidence of actual or fairly inferred bias or prejudice,<sup>177</sup> and, by extension, intentional and invidious infliction of a racial injury, race-coded, natural and necessitarian appeals framed in antebellum and postbellum tropes, narratives, and images constitute legitimate forms of advocacy. The Supreme Court in *Buck v. Davis* leaves both the ineffectiveness of that advocacy and its strained ethical legitimacy intact.

#### IV. Race-Conscious Advocacy and Ethics Practices

Gates's *Stony the Road* charges us with the task of melding race-conscious advocacy and ethics practices into the trial of civil rights, poverty law, and criminal cases. Diligently discharged, that task provides lawyers and clients meaningful, collaborative opportunities to *reframe* and unmask race-coded identity. Reframing, in turn, helps recover the presence of black agency, enhance the exercise of black power, and contextualize the public and private impact of systemic racism on individuals, groups, and communities. When infused by the antistatutory norms of racial dignity and equality garnered from the black resistance movements chronicled by Gates, for example the NAACP and the National Urban League, alternative race-conscious advocacy and ethics practices may prove useful in attacking legal, political, and economic systems of structural inequality, especially where they connect us to past (New Negro Renaissance) and present (Black Lives Matter) resistance movements.

The starting point of race-conscious advocacy and ethics practices is the recognition that *race matters*. Exclaimed by Justice Sotomayor in her dissenting opinion on the political-process doctrine in *Schuetz v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*,<sup>178</sup> race matters because of the long history of racial disenfranchisement and persistent racial inequality exposed by Gates.<sup>179</sup> Like Sotomayor, Gates in *Stony the Road* recognizes the glaring reality of race and centuries of racial discrimination

<sup>176</sup> Buck, 137 S. Ct. at 775 (citation omitted).

<sup>177</sup> MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2020) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.").

<sup>178</sup> 572 U.S. 291, 338, 365, 380 (2014) (Sotomayor, J., dissenting).

<sup>179</sup> *Id.* (citations omitted).

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openly and candidly.<sup>180</sup> Elsewhere, recently for instance in the fields of housing<sup>181</sup> and jury selection,<sup>182</sup> the Supreme Court has addressed racial discrimination in the forms of both institutional disparate treatment and structural disparate impact. Race-conscious advocacy and ethics practices enable civil rights, criminal defense, and poverty lawyers to challenge institutional and structural forms of racism in community-based, civic self-defense and legal-political reform campaigns that amplify black agency, enlarge black power, and promote institution building.

### A. Structural Racism

Gates adduces evidence of white supremacist ideology in the cultural and social history of race and race relations during the late nineteenth and early twentieth centuries. That history clarifies the daily, overt and covert machinations of racial hierarchy in law, politics, and economics. Founded on racial hierarchy, structural racism often clothes discriminatory practices in mundane state law rules of procedure. Consider, for example, the Louisiana and Oregon state nonunanimous jury verdict rules struck down this Term by the Supreme Court in *Ramos v. Louisiana*.<sup>183</sup> In April, the *Ramos* Court held that the Sixth Amendment right to a jury trial, incorporated against the States via the Fourteenth Amendment, required a unanimous verdict to convict a criminal defendant of a serious offense.<sup>184</sup> Delivering the opinion of the Court, Justice Gorsuch noted that the State of Louisiana convicted and sentenced the accused, Evangelisto Ramos, to life in prison without the possibility of parole based on a nonunanimous 10-to-2 jury verdict in which two jurors voted to acquit. In reversing the Louisiana Court of Appeal's affirmance of Ramos's conviction and sentence, Gorsuch reasoned that "if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."<sup>185</sup>

In support of the *Ramos* Court's Sixth Amendment jurisprudence, Gorsuch traced the origins of Louisiana's nonunanimous jury verdict rule to its 1898 state constitutional convention, finding that the "avowed purpose" of the convention "was to 'establish the supremacy of the white race,'" and adding that "the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements."<sup>186</sup> Pointing to the "racial demographics" of the period, Gorsuch explained that convention "delegates sought to undermine African-American participation on juries" by "sculpt[ing] a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'"<sup>187</sup> Gorsuch attributed Oregon's subsequent 1930s adoption of a similar nonunanimous verdict rule "to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"<sup>188</sup> Although he mentioned that Louisiana and Oregon courts "frankly acknowledged that race was a motivating factor" in their States'

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<sup>180</sup> *Id.*

<sup>181</sup> *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>182</sup> *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

<sup>183</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

<sup>184</sup> *Id.* at 1394 (footnote omitted).

<sup>185</sup> *Id.* at 1397.

<sup>186</sup> *Id.* at 1394 (footnote omitted).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

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adoption of nonunanimity rules, Gorsuch insisted that “it’s hard to say why these laws persist, their origins are clear.”<sup>189</sup>

In concurring opinions, both Justices Sotomayor and Kavanaugh alluded to “the legacy of racism that generated Louisiana’s and Oregon’s laws.”<sup>190</sup> Kavanaugh reiterated that Louisiana, at its 1898 state constitutional convention, “enshrined non-unanimous juries into the state constitution . . . to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875.”<sup>191</sup> He too stressed that “the 1898 constitutional convention expressly sought to ‘establish the supremacy of the white race.’”<sup>192</sup> More broadly, he remarked that “the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”<sup>193</sup> Unearthing “the racist origins of the non-unanimous jury,” Kavanaugh commented that “it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors.”<sup>194</sup> Indeed, he declared: “that was the whole point of adopting the non-unanimous jury requirement in the first place.”<sup>195</sup> According to Kavanaugh, “the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors.”<sup>196</sup>

The basis for the *Ramos* Court’s acute description of the antiblack racist history underpinning the Louisiana and Oregon state nonunanimous jury verdict rules comes from the appellate defense team brief filed by the Stanford Law School Supreme Court Litigation Clinic and others on behalf of *Ramos*. In its brief, the defense team confirmed that Louisiana’s jury verdict rule “originated in a concerted effort to maintain ‘white political supremacy’ in the wake of Reconstruction.”<sup>197</sup> From these origins, the team explained, Louisiana’s nonunanimity rule “continued over the years to allow de facto suppression of minority viewpoints,” effectively nullifying the voting power of African-Americans in the state jury pool.<sup>198</sup> Because “[r]acial minorities tend to be under-represented in jury pools,” the team added, minorities “are usually outnumbered on petit juries.”<sup>199</sup> These racial “realities,” it pointed out, “dictate that minority voices can often be discounted or even ignored when unanimity is not needed” in the jury room.<sup>200</sup>

By exposing the current *racial realities* of state jury representation in *Ramos*, the Stanford Law Clinic-staffed appellate defense team revealed a larger, race-contaminated structural inequity pervading state criminal justice systems, namely minority under-representation in jury pools and, by extension, on voter registration lists. In this way, the defense team moved beyond the Supreme Court’s constricted focus on past racial *legacy* and white supremacist *origin* to confront the present racial *realities* of continuing systemic inequities in jury representation and voting registration, and

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1410 (Sotomayor, J., concurring) (citation omitted).

<sup>191</sup> *Id.* at 1417–18 (2020) (Kavanaugh, J., concurring) (citations omitted).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1417–18 (citations and footnote omitted).

<sup>194</sup> *Id.* (citation omitted).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Brief for Petitioner at 31, *Ramos v. Louisiana*, 140 S. Ct. 2228 (2020) (No. 18–5924) (citations omitted); Reply Brief for Petitioner at 13, 15, *Ramos v. Louisiana*, 140 S. Ct. 2228 (2020) (No. 18–5924).

<sup>198</sup> Brief for Petitioner, *supra* note 167, at 32–33 (footnotes omitted).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; Reply Brief for Petitioner, *supra* note 167, at 15.

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thereby, open up a potential legal-political dialogue on the structural barriers to voter access and participation disproportionately affecting low-income communities of color, especially the elderly and the homeless, people with disabilities, students, and naturalized citizens. For Ramos and his clinic appellate defense team, it is not hard to say why such inequities persist; they persist because of the lasting antiblack racism bound up in the white supremacist discourse, imagery, mythology, and scientific logic of the criminal justice and voting registration systems reinforced everyday by judges, legislators, law enforcement officials, and lawyers themselves.

**B. Black Agency**

The Stanford Law School Supreme Court Litigation Clinic's structural framing of race and racial discrimination in *Ramos* models a race-conscious, systemic approach to civil rights, poverty law, and criminal justice advocacy. Community-based, civic self-defense and legal-political reform campaigns require the integration of black agency, power, and institution building into that framework. In *Stony the Road*, Gates connects black agency and political power to the antisubordination norms of racial dignity and equality animating black resistance movements. Troublingly, contextual framing in individual and group representation that overdetermines the structural nature of racial injury and inequality, framing that we see in the important work of our law school clinics and civil rights law firm cohorts, sometimes can undercut black agency and power for individuals, groups, and communities.

Again recall *Andrus v. Texas*. In her Supreme Court petition for a writ of certiorari to the Texas Court of Criminal Appeals, capital appellate counsel adroitly framed the cultural and social context of Andrus's life "story" in terms of the poverty and violence of the historically African-American Third Ward neighborhood of Houston where Andrus was born in 1988.<sup>201</sup> Erecting a kind of structural self-defense, counsel winnowed contextualizing tropes, narratives, and images of systemic, neighborhood disadvantage, social disorganization, and juvenile abuse and mass incarceration from 41 volumes of testimony and documentary evidence generated from the habeas proceeding below.<sup>202</sup> Despite this voluminous record and the risk of naturalistic or necessitarian overreliance on the historically subordinating tropes, narratives, and images of young black male violence, counsel's empathy-evoking petition racially humanized Andrus in a sense reminiscent of Gates's account of the culturally transformative humanization of freedmen and freedwomen during the Reconstruction era. At the same time, in a noteworthy strategic hedge, counsel hewed instrumentally to the colorblind jurisprudence of the Roberts Court majority, nowhere mentioning Andrus's race. Steadfastly colorblind, both the *Andrus* Court's per curiam opinion and Alito's dissenting opinion omitted mention of Andrus's race.

The contextualizing tropes, narratives, and images woven into appellate's counsel petition portrayed Andrus growing up in the midst of an inner-city "crack epidemic" parented by a 17-year-old mother in a family of "five children by five different men, none of whom ever assumed the role of father" but all of whom "brought into the home . . . extensive entanglements with the criminal justice system—including convictions for family violence, injury to a child, sexual assault of a child, and numerous drug-related offenses."<sup>203</sup> On this in depth portrait, Andrus's mother "supported herself and her kids through prostitution and selling drugs," at times "abandoning the

<sup>201</sup> Petition for Writ of Certiorari at 2, 4, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (No. 18–9674).

<sup>202</sup> *Id.* at 5.

<sup>203</sup> *Id.* at 2 (counsel mentioned that "[o]ne of these men raped Andrus's sister when she was eight years old").

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children entirely” and “descend[ing] into depression and drug binges.”<sup>204</sup> Graphically detailed, that portrait depicted “how [Andrus’s] mother taught him the drug trade in their old Third Ward neighborhood where, on his first day ‘on the job,’ he encountered an emaciated crack addict trying to trade her newborn baby for \$5-worth of street drugs.”<sup>205</sup> Pictured as “a casualty of the school-to-prison pipeline” trapped in “a veritable hell on earth” juvenile detention facility for 18 months and a victim of “untreated mental illness” locked up “for weeks at a time in solitary confinement in frigid cells smeared with body fluids in a ward filled with screaming,”<sup>206</sup> Andrus emerges out of the text of counsel’s petition as a *race-coded* figure constructed from the permanently disfiguring tropes, narratives, and images of systemic neglect, structural racism, and urban inequality. According to this skillfully contextualized construction, Andrus when released at age 18 from a “failed” carceral “environment rampant with gang posturing, violent predators, and no meaningful education or rehabilitation,”<sup>207</sup> soon “slipped deep into drug addiction and petty crime,” for the Third Ward neighborhood of Houston “a circumstance that culminated in tragedy.”<sup>208</sup>

The work of capital appellate counsel in *Andrus v. Texas* occurs at the intersection of civil rights, poverty, and criminal justice. Much of the community-based work of civil rights and poverty lawyers, and public defenders too, occurs in the same neighborhood space where the lines of civil and criminal justice advocacy converge. Like the Stanford Law School Supreme Court Litigation Clinic’s structural framing of race and racial discrimination in *Ramos*, appellate counsel’s framing in *Andrus* models a race-conscious, systemic approach pushing against the constraints of colorblind convention in advocacy and adjudication. Appellate counsel’s despairing invocation of “professional norms”<sup>209</sup> to censure the ineffectiveness of trial counsel in the *Andrus* petition underlines the failure of ethics regimes not only to oversee adequately the representation of indigent offenders, but also to regulate meaningfully the representation of race in cases rooted in structural inequality.

To make progress in neighborhoods like Houston’s Third Ward or in our own poverty-stricken neighborhoods of Boston and Miami, both the *Ramos* and *Andres* models of contextual, race-conscious lawyering must find room for stronger expressions of black agency, power, and institution building in civic self-defense and legal-political reform advocacy. Moreover, the *Ramos* and *Andres* models of race-conscious lawyering must escape the constraints of colorblind advocacy, the complex politics of respectability, and the figurative, often binary constructs of subjugation. Consider, for example, the current voter-registration rights litigation campaign challenging Florida’s “pay-to-vote” scheme<sup>210</sup> conditioning the voting eligibility of nearly one million otherwise-eligible citizens on payment of their outstanding legal financial obligations, including all fines, fees, and restitution imposed as part of a criminal sentence.<sup>211</sup> By turns colorblind and race-conscious, the campaign’s consolidated civil rights cases demonstrate the difficulty of combining white-only class representatives with a cultural discourse of respectability

<sup>204</sup> *Id.* at 2–3.

<sup>205</sup> Reply to State’s Brief in Opposition at 7–8, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (No. 18–9674) (citation omitted).

<sup>206</sup> *Id.* at 3.

<sup>207</sup> *Id.* at 3.

<sup>208</sup> *Id.* at 4.

<sup>209</sup> Petition for Writ of Certiorari, *supra* note 171, at 39.

<sup>210</sup> See Fla. Stat. § 98.0751 (2020 Cum. Supp.); *Advisory Opinion to Governor re: Implementation of Amdt. 4, The Voting Restoration Amdt.*, 288 So.3d 1070, 1081 (Fla. 2020).

<sup>211</sup> *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868, at \*1–3 (U.S. July 16, 2020) (Sotomayor, J., dissenting).

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and racial progress voiced by black individual and organizational plaintiffs in opposition to felony disenfranchisement without reproducing the binary constructs of racial subjugation or sacrificing a commitment to black agency and power.<sup>212</sup>

## CONCLUSION

The lessons of race and legal representation offered by *Stony the Road* depart from the Obama era aspiration of “a post-racial America.”<sup>213</sup> Gates rejects an “end of race and racism” narrative as both naïve and ahistorical.<sup>214</sup> He also recognizes an inextricable linkage between economic advancement and political rights.<sup>215</sup> Most important, by uprooting the white supremacist tropes, narratives, and images of postbellum Redemption and Jim Crow segregation grounded in contemporary American cultural and social discourse, he reveals how race-coded rhetoric continues to shape the roles, mediate the relationships, and organize the methods of the lawyering process in civil rights, poverty law, and criminal cases. Moreover, he demonstrates how the trial of civil rights, poverty law, and criminal cases provides a forum for lawyers, judges, jurors, and even witnesses to race-code (dehumanize) the identity of accused and convicted offenders, impoverished clients, and victims of discrimination. Further, he shows how the trial of civil rights, poverty law, and criminal cases affords collaborative client-lawyer opportunities to unmask and humanize race-coded identity, restore black agency and power, and contextualize systemic racism.

The challenge posed by Gates for lawyers, and their civil and criminal justice clients and partner communities of color, is to learn how jointly to sustain local civic self-defense and institution building initiatives, reconcile their internal tensions, and collaboratively devise a workable set of race-conscious practices sufficient to *reframe* black agency, identity, and resistance in legal-political advocacy. In *Stony the Road*, Gates deploys the lessons of science, literature, and history to teach lawyers not merely to curtail the use of Jim Crow stereotypes and to restrain the rhetoric of white supremacy in advocacy, but, equally, to integrate the community-based politics of black agency and resistance into the organization and mobilization of law reform and movement-building campaigns for equal rights.

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<sup>212</sup> See *Jones v. DeSantis*, No. 4:19CV300-RH/MJF, 2020 WL 2618062 (N.D. Fla. May 24, 2020), *hearing en banc ordered sub nom. McCoy v. Governor of Fla.*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020).

<sup>213</sup> GATES, *supra* note 8, at 2.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 23.